

ORS 79.2010
ORS 79.2040(3)
Future Advances
Dragnet clause
Cross-Collateralization

In Re Wollin
In Re Moody

699-63363-aer13
#699-63364-aer13

6/2/00

Radcliffe

Published (249 B.R. 555)

Two cases were consolidated for opinion because both involved similar facts and legal issues. In each case, the debtors, prefiling gave a credit union a security interest in certain vehicles. The loans were given either to purchase a vehicle or to consolidate debt. Each security agreement contained a "dragnet" clause purporting to "drag" in both antecedent and future debt, so as to secure same with the vehicles.

The issue before the court was whether these dragnet clauses operated to secure VISA charges incurred after the security agreements were executed, and certain lines of credit and VISA charges incurred before execution. Oregon law controlled.

As to future debt, the court applied the "same class" test enunciated in Community Bank v. Jones, 278 Or. 647, 666, 566 P.2d 470 482 (1977). It declined to adopt a per se test that all consumer and/or purchase money debt is of the same class. It held the VISA charges incurred after execution of the security agreement were not of the same class as the vehicle purchase money loan, stating "a loan to purchase a vehicle differs both in scope and solemnity from the miscellaneous charges typical of a VISA account." It further found the VISA charges were not sufficiently related to the prior secured loan to consolidate debt.

As to antecedent debt, on an issue of apparent first impression, the court adopted a "specific reference" standard, that is, to be enforceable, a dragnet clause must specifically reference any antecedent debt. Because the clauses at bar did not do so, they were not enforceable as to the antecedent lines of credit and VISA charges, and thus the vehicles did not secure same.

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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

In Re:)	Bankruptcy Case No.
)	699-63363-aer13
PATRICIA J. WOLLIN)	
)	
Debtor.)	
)	
STEVEN L. MOODY and)	Bankruptcy Case No.
CYNTHIA K. MOODY,)	699-63364-aer13
)	
Debtors.)	MEMORANDUM OPINION

These matters come before the Court on Oregon Federal Credit Union's (OFCU's) objections to confirmation and the debtors' objections to OFCU's proofs of claim.

Procedural History:

On June 7, 1999, Steven and Cynthia Moody (Moody) filed their Chapter 13 petition. On that same day, Patricia Wollin (Wollin) also filed a Chapter 13 petition. OFCU filed a secured claim in each case. Both the Moodys and Wollin filed Chapter 13 plans proposing to modify OFCU's secured claim.

1 In each case, OFCU objected to confirmation and the debtors
2 objected to OFCU's proof of claim. The two cases are factually
3 similar, and share the same legal issues.

4 At a joint hearing on confirmation and the claims objections,
5 the parties stipulated to the values of certain vehicles securing
6 OFCU's claim. The parties also filed a "Stipulation of Facts". The
7 Chapter 13 Trustee recommended confirmation in both cases. At the
8 hearing's conclusion, the Court took the matters under advisement.
9 Since then, the Court has received correspondence from the Moodys'
10 counsel as to a stipulation reached regarding the disposition of a
11 vehicle representing part of OFCU's collateral.

12 **Facts:**

13 **Moodys:**

14 On February 7, 1992 OFCU gave Steven Moody a \$3,000.00
15 LoanLiner line of credit. No security, except a \$5.00 pledge of
16 credit union shares, was given. On April 26, 1996 OFCU gave the
17 Moodys a \$3,900.00 advance pursuant to a "LoanLiner Application and
18 Credit Agreement" and an "Advance Request Voucher and Security
19 Agreement." The loan was to consolidate debts. To secure this
20 loan, the Moodys gave OFCU a security interest in a 1978 Ford Bronco
21 (the Bronco). The Moody's have agreed to surrender the Bronco, and
22 OFCU has waived any deficiency claim.¹

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24 ¹ The Bronco's surrender was agreed to after the Court took the
25 matters at bar under advisement. The surrender does not however moot
26 the issues regarding the debts secured by the Bronco, as there is a
possibility, (admittedly remote), that a sale on repossession could
(continued...)

1 On July 30, 1996 OFCU gave the Moodys a \$31,850.50 advance
2 pursuant to another "LoanLiner Application and Credit Agreement" and
3 "Advance Request Voucher and Security Agreement." This loan was to
4 purchase a 1996 Ford F350 pickup truck(the Pickup). To secure this
5 loan, the Moodys gave OFCU a security interest in the Pickup. The
6 Pickup's replacement value is \$23,630.00.

7 In December, 1998 OFCU issued a visa card to Steven Moody.²

8 **Wollin:**

9 On April 30, 1988 OFCU gave Wollin a \$2,000.00 line of
10 credit. In May, 1988 OFCU issued a visa card to Wollin.

11 On July 17, 1996 OFCU gave Wollin a \$9,000.00 advance
12 pursuant to a "LoanLiner Application and Credit Agreement" and an
13 "Advance Request Voucher and Security Agreement." The loan was to
14 purchase a 1995 Ford Probe (the Probe).³ To secure the loan, Wollin

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19 ¹(...continued)
20 garner more than the primary debt against the Bronco.

21 ² Although not in the Stipulation, OFCU's proof of claim
22 reflects the balances as of the petition date on the line of credit,
23 Bronco Loan, Pickup Loan, and Visa card as \$3,018.50, \$1,870.94,
\$21,614.18, and \$2,342.60 respectively. The Moodys did not present
any evidence contradicting these figures at the hearing. As such,
under FRBP 3001(f), the Court adopts OFCU's figures.

24 ³ The July 1996 loan secured by the Probe, as well as the April
25 and July 1996 loans to the Moodys, secured respectively by the
26 Bronco and Pickup, will collectively be referred to as "the vehicle
loans." All other loans will be referred to collectively as the
"non-vehicle loans."

1 gave OFCU a security interest in the Probe. The Probe's replacement
2 value is \$9,341.00.⁴

3 **Common Facts:**

4 The vehicle loan security agreements all contained identical
5 "dragnet" clauses, discussed below. OFCU maintains a perfected
6 security interest in the vehicles. OFCU did not discuss any cross-
7 collateralization rights with the debtors at the time of any of the
8 above loan transactions. The debtors did not read their loan
9 documents and were unaware of the cross-collateral rights asserted
10 by OFCU at the time of each advance.

11 When OFCU is asked to release collateral granted by one of
12 its members under loan agreements, like those governing the Moodys'
13 and Wollin's accounts, OFCU reviews whether the member is in
14 default on other loans secured by the collateral. If there is no
15 default, OFCU generally releases the collateral. If one or more of
16 the other loans are in default, OFCU generally does not release the
17 collateral.

18 **Issue:**

19 The question presented is whether the vehicles secure the
20 "non-vehicle" loans. In addressing this question, the Court must
21 examine the enforceability of the "dragnet" clause in each "Advance
22 Request Voucher and Security Agreement" as it relates to debt

23 ⁴ Although not in the Stipulation, OFCU's proof of claim
24 reflects the balances as of the petition date on the line of credit,
25 VISA card, and Probe loan as \$2,919.04, \$1,989.00 and \$5,045.81
26 respectively. Wollin did not present any evidence contradicting
these figures at the hearing. As such, pursuant to FRBP 3001(f), the
Court adopts OFCU's figures.

1 incurred both subsequent and antecedent thereto. State law (here
2 Oregon) controls these issues.

3 **Discussion:**

4 The dragnet clause provides in pertinent part as follows:

5 The security interest secures the advance and any
6 extensions, renewals or refinancings of the advance.
7 It also secures any other advances you have now or
8 receive in the future under the LOANLINER Credit
9 Agreement and any other amount you owe the credit
10 union for any reason now or in the future.⁵

11 A. Subsequent Loans (VISA charges in Moody):

12 OFCU argues the dragnet clause should be enforced under ORS
13 79.2010⁶ according to its plain meaning. Thus, because the Moody
14 VISA charges are "any other amount" owed "in the future", the Bronco
15 and Pickup secure the charges. In the alternative, OFCU argues the
16 VISA charges are of the "same class" as the Bronco and Pickup loans,
17 because they all were consumer debt. Thus, the VISA charges are
18 secured by these vehicles. For the reasons set forth below, the
19 Court rejects both of these arguments.

20 ⁵ A similar clause is found in each "LoanLiner Application and
21 Credit Agreement" as follows:

22 Property given as security under this
23 Plan or for any other loan will secure
24 all amounts you owe the credit union
25 now and in the future.

26 ⁶ ORS 79.2010 provides in pertinent part:

Except as otherwise provided by the Uniform
Commercial Code a security agreement is effective
according to its terms between the parties....

1 The law in Oregon is well-settled regarding the standard for
2 bringing future debt into a dragnet clause.⁷ As stated by the
3 Oregon Supreme Court, "no matter how the clause is drafted, the
4 future advance to be covered must 'be of the same class as the
5 primary obligation...and so related to it that the consent of the
6 debtor to its inclusion may be inferred.'" Community Bank v. Jones,
7 278 Or. 647, 666, 566 P.2d 470, 482 (1977) (quoting with approval,
8 National Bank of Eastern Arkansas v. Blankenship, 177 F. Supp. 667
9 (E.D. Ark. 1959), aff'd sub nom., National Bank of Eastern Arkansas
10 v. General Mills, Inc., 283 F.2d 574 (8th Cir. 1960)) (emphasis
11 added). Thus, the Oregon Supreme Court has clearly rejected the
12 "plain meaning" argument that OFCU proffers.

13 Concerning debts which meet the "same class" test, at least
14 in the business loan context, the courts have construed the Oregon
15 standard with some variation. Compare Community Bank, supra (loan
16 to satisfy overdraft on business checking account was not related to
17 prior floor financing loan in which security was given, even though
18 both loans were for business purposes), with Lansdowne v. Security
19 Bank of Coos County, (In Re Smith & West Construction, Inc.), 28 B.R.

22 ⁷ Future advances may be swept into security agreements under
23 ORS 79.2040(3), which provides in pertinent part:

24 Obligations covered by a security agreement may
25 include future advances or other value....

26 However, as discussed below, the standards for sweeping in
future advances are court imposed.

1 682 (Bankr. D. Or. 1983) (holding that loans of a business nature,
2 all evidenced by promissory notes, were of the same class).

3 The Court could find no Oregon authority applying the "same
4 class" standard in the consumer loan context. Other jurisdictions
5 have taken a variety of approaches. Some have held that all
6 consumer debts meet the test. E.g., In Re Johnson, 9 B.R. 713
7 (Bankr. M.D. Tenn. 1981) (applying Tennessee law).⁸ Others have
8 held that if the primary loan is for a purchase money transaction,
9 then only subsequent purchase money loans meet the test. E.g.,
10 Dalton v. First National Bank of Grayson, 712 S.W.2d 954 (Ky. 1986)
11 (applying Kentucky law). Finally, some courts appear to require
12 that each consumer transaction be for the same specific use, and not
13 be evidenced by separate debt instruments. E.g., In Re Grizaffi, 23
14 B.R. 137 (Bankr. D. Co. 1982) (applying Colorado law).

15 It appears that the Oregon Supreme Court would apply at least
16 as strict an interpretation of the "same class" test in the consumer
17 context as in the business context.⁹ In Community Bank, supra, the
18 plaintiff bank, over a period of years, provided inventory flooring
19 financing for defendant Jones' automobile business. Jones gave back
20 a security interest in his inventory, with the collateral securing

22 ⁸ The Johnson holding was subsequently superseded by statute,
23 as recognized in In Re Willie, 157 B.R. 623 (Bankr. M.D. Tenn.
24 1993) (The Tennessee legislature eliminated the "same class"
standard).

25 ⁹ Some courts have noted that dragnet clauses may be more
26 strictly construed in the consumer context, because of the parties'
unequal bargaining position. E.g., Bank of Kansas v. Nelson Music
Company, Inc., 949 F.2d 321 (10th Cir. 1991) (applying Kansas law).

1 all "notes." Jones then began issuing overdrafts on his business
2 checking account, which the bank honored for a time. When Jones
3 began experiencing financial difficulties, the bank refused to pay
4 on the overdrafts, having decided it would only pay on collected
5 funds. It did however, give Jones a loan, evidenced by a trust
6 receipt, which was credited directly to Jones' overdrawn checking
7 account. The issue in the case was whether this latter loan was
8 covered by the "notes" language in the inventory security agreement.
9 The Oregon Supreme Court found the reference to "notes" included
10 trust receipts. It held, however, that the "same class" test had
11 not been met, even though both the flooring loans and the trust
12 receipt were business related. It explained:

13 The only practical effect of this transaction [the
14 trust receipt] was to reduce a portion of the
15 previously unsecured debt created by the overdrafts
16 against Jones' checking account. Unlike the other
17 monies loaned pursuant to the security agreement, the
18 December 17 transaction gave Jones no financing with
19 which to floor new inventory.

20 Although this transaction appears in form to
21 conform to the security agreement, we find its
22 substance to be different in kind and not related to
23 the purpose intended by the parties when they entered
24 into the October 28 security agreement. (Parenthesis
25 Added).

26 Id. at 666, 566 P.2d at 482.

 This Court used similar reasoning to enforce a dragnet clause
in In Re Bear Cat Logging, Inc., Case #693-60940-aer11 (Bankr. D.Or.
April 18, 1994) (unpublished) (Radcliffe, J.) finding that leases and
loans met the standard where they were all for the purpose of
enabling the debtor to acquire heavy logging equipment and vehicles

1 to be used in the debtor's business. Under the Community Bank
2 standard, loans of the same general category (i.e., all business
3 loans or all consumer loans) do not necessarily meet the "same
4 class" standard.

5 This Court also declines to adopt a per se test based on the
6 status of the loans as purchase money transactions. The future
7 transaction must be "so related to" the primary loan "that the
8 consent of the debtor to its inclusion may be inferred." Community
9 Bank, supra. Here, the Court cannot find the VISA charges (while
10 presumably purchase money), sufficiently related to the Pickup
11 loan.¹⁰ A loan to purchase a vehicle differs both in scope and
12 solemnity from the miscellaneous charges typical of a VISA account.
13 The Court cannot infer the Moodys' consent to have their vehicles
14 secure the VISA account.

15 B. Antecedent Loans: (February 1992 Line of Credit in Moody);
16 (April 1988 Line of Credit, and VISA charges in Wollin):

17 Regarding the loans which were antecedent to the vehicle
18 loans, OFCU again argues that the plain meaning of the dragnet
19 clauses should be applied. The debtors, on the other hand, argue
20 that antecedent loans must be specifically referenced in the dragnet
21 clauses to be enforceable.

22 The Court finds no Oregon authority directly on point.
23 Elsewhere, courts are split. A significant number (perhaps a
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25 ¹⁰ Neither can the Court find the VISA charges sufficiently
26 related to the Bronco loan, the purpose of which was to "consolidate
debt."

majority) apply the "plain meaning" test urged by OFCU. E.g., In Re Stannish, 24 B.R. 761 (Bankr. N.D. Ill. 1982) (applying Illinois law); First National Bank v. First Interstate Bank, 774 P.2d 645 (Wy. 1989) (applying Wyoming law). Others apply the "same class" standard. E.g., Potomac Coal Co. v. \$81,961.13 in the Hands of an Escrow Agent, 451 Pa. Super. 289, 679 A.2d 800 (1996) (applying Pennsylvania law). Still others have demanded that the dragnet clause specifically reference any antecedent debt (the "specific reference" standard). E.g., National Bank of Eastern Arkansas v. Blankenship, 177 F. Supp. 667 (E.D. Ark. 1959), aff'd sub nom., National Bank of Eastern Arkansas v. General Mills, Inc., 283 F.2d 574 (8th Cir. 1960) (applying Arkansas law); In Re Hill, 210 B.R. 1016 (Bankr. E.D. Wi. 1997) (applying Wisconsin law); Lundgren v. National Bank of Alaska, 756 P.2d 270, 278 (Ak. 1987) (applying Alaska law).¹¹

As with future advances, this Court rejects the "plain meaning" test as to antecedent debt. The Oregon Supreme Court has adopted a standard stricter than "plain meaning" for future advances. This Court cannot conclude that it would lessen that standard for antecedent debt, especially in the consumer context.¹² Instead, guided by the policy that dragnet clauses are generally disfavored and strictly construed, this Court adopts the "specific

¹¹ At least one court has adopted a multi-level inquiry, including the "same class" and "specific reference" standards. See Wallace v. United Mississippi Bank, 726 So.2d 578 (Miss. 1998) (applying Mississippi law).

¹² See f.n. # 9.

1 reference" standard as divining the parties' true intent and
2 comporting with sound public policy. As the Alaska Supreme Court
3 notes:

4 A key rationale underlying these holdings is that
5 since the antecedent debt is already owed by the
6 borrower to the lender, the parties would have had no
7 good reason not to identify it in the subsequent
8 security instrument if they had truly intended the
9 deed of trust or mortgage to cover it.

10 Lundgren, supra at 278.

11 Here, the antecedent debts are not specifically referenced,
12 as such, the vehicles do not secure them.¹³

13 ¹³ One other issue was cryptically briefed and argued by the
14 parties, that is, the enforceability of the cross-collateral clauses
15 in the VISA agreements themselves.

16 In Moody, the VISA cross-collateralization clause provides as
17 follows:

18 You grant the Credit Union a Security interest in all
19 existing and future funds of your accounts with the
20 Credit Union to secure advances under the VISA Credit
21 Card Agreement. You further acknowledge that this
22 VISA account is cross collateralized with any Loan
23 Liner subaccount.

24 Initially, it must be noted that the VISA agreement, both at
25 the top, in the type of account applied for, and at the bottom, in
26 the type of account approved, indicates the card was a "debit" card.
Under the agreement the cross-collateral clause only applies to a
"credit" card. Thus, it is arguable whether the clause even
applies. Assuming it does, the clause cannot be read to identify the
vehicles (generically or specifically) as collateral.

27 In Wollin, the VISA cross-collateralization clause, provides:

28 To secure your account you grant us a purchase
29 money security interest under the Uniform
30 Commercial Code in any goods you purchase
31 through the account....With respect to this

(continued...)

1
2 **Conclusion:**

3 Based upon the foregoing, OFCU's objections to confirmation
4 should be overruled and the debtors' objections to OFCU's claims
5 should be sustained, an order consistent herewith shall be entered.

6 This opinion constitutes the Court's findings of fact and
7 conclusions of law pursuant to FRBP 7052. They shall not be
8 separately stated.

9
10 ALBERT E. RADCLIFFE
11 Chief Bankruptcy Judge
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15 ¹³ (...continued)

16 account only, we will not assert any statutory
17 right we may have if you are in default to
18 prevent withdrawal of your unpledged Credit
19 Union shares below the unpaid balance of your
20 account. However if you have given us a specific
21 pledge of your Credit Union shares or any other
22 security interests for all your debts, your
23 account will also be secured by your pledged
24 shares and the property described in those other
25 security agreements. (emphasis added)
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21 The operative language, "if you have given", denotes past, not
22 future tense. As the Probe loan was executed after the VISA
23 agreement, the clause is ineffective to secure the VISA charges with
24 the Probe.
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